In most of the other states the rule is the same, except that the doctrine of vice-principalship is recognised, and except that *all* those who are charged with the master's duty towards the servants are representatives of the master, and are not fellow-servants of the other servants.

In some states and in the Federal courts there is the further limitations that no servant is a fellow-servant of one to whom he is subordinate, and that servants in different departments of duty are not fellow-servants of each other.

EDGAR G. MILLER, JR.

Baltimore.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

BRIGGS v. GARRETT.

Citizens and voters have the constitutional right publicly to discuss and canvass the qualifications of candidates for public office, and information honestly communicated by one citizen to others at a public meeting, to the effect that a candidate for such office had been charged by a reputable citizen with grave misconduct, is a privileged communication, and the person communicating such information is not liable to an action for libel therefor, although the charge was false in fact and its falsity could have been discovered by inquiry.

Such communication being privileged, legal malice is not inferable, and on the trial of a civil action for libel against the party who made the communication the court is justified, in the absence of proof of actual malice, in entering a nonsuit.

The fact that reporters of the public press were present at the meeting at which such privileged communication was made is immaterial.

At a meeting of a body of citizens of Philadelphia, styled the "Committee of One Hundred," assembled for the purpose of considering the merits of candidates for public office, a letter reflecting severely upon the character of one of the judges of the Common Pleas, who was a candidate for re-election, by statements subsequently acknowledged to be wholly untrue, was, by order of the chairman, read by the secretary, and appeared at length the following day in the daily papers. *Held*, that the communication being based upon probable cause, was proper for discussion at such a meeting, and the court will not reverse a judgment of nonsuit entered in an action for libel brought against the chairman of the meeting.

MERCUR, C. J., and GORDON and STERRETT, JJ., dissent.

ERROR to Common Pleas No. 1, Philadelphia county.

Reargument. Case, by Amos Briggs against Philip C. Garrett, for libel. Plea, not guilty.

Amos Briggs, for plaintiff in error.

George H. Earle, Jr., and *Richard P. White*, for defendant in error.

The facts are fully stated in the opinion of the court which was delivered by

PAXSON, J.—This was an action for a libel. The plaintiff was nonsuited in the court below, and this writ of error was taken to the refusal of the court to take it off. It is necessary to an intelligent discussion of the law of the case that we should premise it by an accurate statement of the facts. I take them as given by the plaintiff in his history of the case, or proved by his witnesses upon the trial. During the year 1882 the plaintiff was an Associate Judge of the Court of Common Pleas No. 4 for the county of Philadelphia. In the month of September of that year he was nominated for re-election to that office. At that time there was in existence, in the city of Philadelphia, a voluntary association of citizens known as the "Committee of One Hundred," of which the defendant, Philip C. Garrett, was the chairman. It is unnecessary, and perhaps would be improper, in a judicial opinion, to discuss the object and work of that committee. It is sufficient for the purposes of this case to say that it was composed of gentlemen of the highest respectability, and that its object was political, confined, however, generally to matters of a municipal character. The rights of the committee, whether as a body or as individuals, were precisely those of any other citizens—neither more nor less. At a public meeting of the committee, held on the 16th day of October 1882, at which the reporters of the city papers were in attendance, and in their presence and hearing, the defendant stated that he had received a letter from an ex-city official, in which it was stated that it was only by the charge of Judge BRIGGS to the jury that the $200,000 steal in the *Hart Creek Sewer Case* had been made possible. The defendant then handed the letter to the secretary of the committee, with the remark that the secretary will read the letter. The secretary then read the letter aloud, in the presence and hearing of all present. It was as follows:

"10–11–'82.

"*Philip C. Garrett, Esq., President of the Committee of a Hundred*—MY DEAR SIR: The Hart Creek sewer steal, of $200,000, was only made possible by Judge BRIGGS' charge to the jury. See

the charge and reflect on the facts. In the *first* place, the specifications were drawn for the express purpose of driving off all but ring bidders. *Second.* There was no effort made to hold the contractor to the specifications. He was allowed to tooth the bricks, when the specifications called for racking back. *Third.* The specifications called for a sewer impervious to water, when it was in evidence that a large number of crevices would hold a happy family of animals. *Fourth.* All the measurements were made by city officials in favor of the contractor. In one measurement the sewer was measured $80,000 too long.

"Your obedient servant, T. J. LOVEGROVE,
"One of the Hart Creek Sewer Experts.'

The writer of this letter was a mechanical expert, and at one time had been an official in the service of the city. It was not denied that he was a reputable citizen. It is equally clear that Judge BRIGGS did not charge the jury in the *Hart Creek Sewer Case.* It was not even tried in his court, and it was conceded that the charge of the learned judge who did try it was fair, impartial, and in every way proper. Upon a motion for a new trial his rulings were unanimously sustained by the court *in banc.* Mr. Lovegrove, the writer of the letter, when on the stand, acknowledged that the letter, so far as it connected Judge BRIGGS, with the *Sewer Case,* was a mistake, and that it was his (Lovegrove's) mistake. He further stated that he did not communicate with Mr. Garrett, directly or indirectly, about the letter before sending it. It also appeared that a few days after the letter was read to the committee, Mr. Garrett received a communication stating that it was Judge FELL and not Judge BRIGGS who tried the *Sewer Case,* which letter was read in the same way, and with the same publicity before the committee by Mr. Garrett. The court below, upon this state of facts held that the letter came within the class of privileged communications in which malice is not presumed; and, as no actual malice was proved upon the trial, entered a judgment of nonsuit, which judgment the court *in banc* subsequently sustained.

In what follows we shall consider merely the responsibility of the defendant for his part in this transaction. We have nothing to do with Lovegrove, the writer of the lettter, who originated and sent forth the charge against Judge BRIGGS. The defendant must answer precisely as any other citizen and voter.

Was the letter a libel? We listened to an ingenious and labored argument at bar to show that it was not. It may be that a trained lawyer, reading it with care, would understand that the judge in his charge to the jury was constrained by the law, or the state of the evidence before him, to charge in the way he did, although the result might be an unrighteous verdict. This is often the case, and yet no blame can be imputed to the judge. But would the public so regard it? There was no allegation that the object of the letter was to commend the action of Judge BRIGGS in the *Hart Creek Sewer Case*. That it was intended as a reflection is too plain for argument; and, assuming the statements contained in the letter to be true, regard being had to the excited state of the public mind at that time in reference to municipal corruption, we can understand that it would have a damaging effect upon the public mind. Those who knew Judge BRIGGS, and the perfect integrity with which he carried himself in his high office, would not be influenced by such a letter. It is not necessary, however, in the view we take of the case, to discuss this question at length. We shall assume the letter to be actionable, unless excused by the circumstances attending its publication.

This brings us face to face with the question, in what manner and to what extent the fitness of a candidate for a public office may be discussed by the people whose votes may elect or defeat him. It is a question of supreme importance, involving, on the one hand, the liberty of the press; on the other, the rights of the people to be secure in their property and reputation. Both are provided for in article 1, § 7, of the constitution, which declares: "The printing press shall be free to every person who may undertake to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. [No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers, or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury, and in all indictments for libels the jury shall have the right to determine the law and the facts under the direction of the

court, as in other cases.]" The portion of the section inclosed in brackets is new; the balance thereof is to be found in the constitution of 1838. The new portion refers only to a trial upon an indictment for libel, and does not apply to a civil action to recover damages. *Barr* v. *Moore*, 87 Penn. St. 385. Its discussion at present is therefore unnecessary.

The right of the citizen here given, to "freely speak, write or print," is as broad as language can make it, with the single limitation that he shall be responsible for the abuse of that privilege. Did Mr. Garrett abuse it? When Judge BRIGGS accepted the nomination as a candidate for re-election to the judicial station which he then filled, he threw out a challenge to the entire body of voters of the county of Philadelphia to canvass his qualifications and fitness for that position. That involved, in the "fierce light that beats upon the bench," not only his official conduct for the term about closing, but, generally, his fitness for the position of judge. In this may be included many things beyond mere legal knowledge. A man may be a learned lawyer, and yet be wholly unfit for judicial station. There may be faults of temper, mental idiosyncrasies, and such manner of walk and conversation in private life as a people jealous of the reputation of their judiciary would never tolerate. If, therefore, these are elements proper for consideration in forming an estimate of judicial character, they are proper subjects for discussion, within the limits defined by the constitution. What those limits are I shall endeavor, as briefly as the importance of the subject will allow, to point out, so far as they affect this case. As preliminary to this discussion, it may not be out of place to refer to the latest deliverance of this court upon this subject. It will be found in *Ex parte Steinman*, 95 Penn. St. 220. In that case the plaintiffs in error, who were editors of a newspaper, as well as members of the bar were disbarred by the court below for publishing an article in their newspaper reflecting on the official conduct of the court. The order was reversed by this court, in an opinion by the late Chief Justice SHARSWOOD, in the course of which he said: "Judges, in 1835, were appointed by the governor, and their tenure of office was during good behavior. There might, then, be some reason for holding that an appeal to the tribunal of popular opinion was, in all cases of judicial misconduct, a mistaken course, and unjustifiable in an attorney. The proceedings by impeachment or by address were the course, and the only course, which could be

resorted to, to effectually remedy the supposed evil. To petition the legislature was then the proper step. To appeal to the people was to diminish confidence in the court, and bring them into contempt without any good result. We need not say that the case is altered, and that it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship." A lawyer, by reason of his constant intercourse with the court, has greater facilities for forming a correct opinion of the character of the judge. But he has no higher right to comment thereon than has the citizen who elects him, and whose life, liberty and property may depend upon his official action.

In considering Mr. Garrett's liability for what occurred on the 16th of October, we must confine ourselves to his own acts. He made no charge against Judge BRIGGS, nor did he indorse one. He had no knowledge or information in regard to the subject-matter of the charge, nor did he profess to have. He received a letter from a reputable citizen, addressed to him as chairman of the committee, containing certain statements about Judge BRIGGS, then a candidate before the people for re-election. If true, the matter was important, and proper for public information. The plaintiff conceded this. The letter was intended, as its address plainly indicates, not for Mr. Garrett individually, but for the committee. He was merely the conduit through which it was to pass. What did he do? As before stated, he said to the committee that he had received a letter from an ex-city official, containing a charge (specifying it) against Judge BRIGGS. This was true. He had received such a letter, and it did contain such a charge. He then, in the usual course of business, handed the letter to the secretary, with instructions to read it, and it was read. This is the sum of Mr. Garrett's offending. Much stress was laid upon the fact that the reporters were present, and that the letter was scattered broadcast over the country next morning by the press. But for this the newspapers were responsible, and whether their act was justified or otherwise is a matter for which Mr. Garrett cannot be held responsible. It was not his act.

Was Mr. Garrett justified in giving the letter to the committee in the manner he did? As it was not a private letter, but addressed to the committee through him, he might perhaps have questioned his right to withhhold it from those for whom it was intended. But

we will not decide the case upon such a narrow point as this. We prefer to meet the broad question presented by the record. As before observed, Mr. Garrett had no knowledge as to the truth of the matters alleged in the letter. The plaintiff contends he had no right to make public its contents without having first made an investigation into the facts; and the words in the letter, "See the charge, and reflect on the facts," were pressed upon our attention as being calculated to put him upon inquiry. But we do not place such a construction upon this language. It was intended to emphasize the charge contained in the letter, not to express a doubt as to its truth. On the other hand, the defendant contended that the letter was a privileged communication; that it was written in good faith; that it was sent to Mr. Garrett, and by him communicated to the committee in good faith, and for a proper purpose; that, if true, the matters alleged were proper for public information; that, if untrue, it was still privileged, unless the parties knew it to be false, and therefore malicious. The plaintiff admits that if it was privileged, no recovery can be had without proof of actual malice. There was no proof of actual malice upon the trial, and it is almost unnecessary to say that the law does not imply malice in a privileged communication.

This brings us to the vital question in the cause, was this letter a privileged communication? We are here met with the inquiry, is falsehood privileged? I answer, no. A lie is never privileged. It always has malice coiled up within it. When a man coins and utters a lie, or when he repeats it knowing it to be false, the law implies malice, and he cannot shelter himself behind the doctrine of privileged communications. I may illustrate this by the familiar instance of an inquiry into the character of a servant. If I say I believe him to be a thief, upon information derived from others, or from facts and circumstances within my own knowledge—in other words, if my statement *is based upon probable cause*,—the communication is privileged, and I am not responsible, even though it should appear I was entirely mistaken. If, on the contrary, I knowingly and falsely accuse him of dishonesty, such charge is not privileged, and I am liable in damages for the consequences of such statement. We have no concern with the knowledge or motive of the writer of the letter. Conceding, for the purposes of this case, that every word contained therein is false, and was known to be so by the writer; that it was sent out of pure malice to injure and

defame Judge BRIGGS—no such knowledge was brought home to Mr. Garrett, nor is there anything in the case from which it would be justly imputed to him. So far as he is concerned, it was a mistake—nothing more. The difference between an honest mistake made in the pursuit of a proper object, and a wilful falsehood, coined for the purpose of deception, is so palpable that we may well be excused from dwelling upon it at length. It is mistakes, not lies, that are protected under the doctrine of privilege. A communication to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made, in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel; actual malice must be proved before there can be a recovery; and whether a communication be privileged or not is a question for the court, not the jury.

An action for libel is upon all fours with an action for a malicious prosecution. The latter is but an aggravated form of an action for libel, as in it the libel is sworn to before a magistrate. The cases make no distinction between them. When, therefore, a man may charge another, under oath, before a magistrate, with a high crime, without responsibility therefor, provided he acts upon probable cause, surely he may, upon probable cause, charge a candidate for a public office with an act which, if true, would render him an unfit person to receive the suffrages of the people; and if probable cause exists in either case, the question of malice becomes of no importance. It is useless to cite the authorities upon this point; they all agree. I will refer, however, in passing to *Chapman* v. *Calder*, 14 Penn. St. 365; *Winabiddle* v. *Porterfield*, 9 Id. 137; *Travis* v. *Smith*, 1 Id. 334.

Before I proceed further, I will notice some of the cases in which the principle has been applied. In *Gray* v. *Pentland*, 2 S. & R. 23, it was held that accusations preferred to the governor, against a person in office, are so far in the nature of judicial proceedings that the accuser is not held to prove the truth of them. It is excused if they did not originate in malice, and without probable cause; in other words, that the accusations were privileged, and raised no presumption of malice. It was not contended in that case, nor do I know that it has been in any other, that a man may use the cloak of a privileged communication as a cover for malice and falsehood.

In *Marks* v. *Baker*, 28 Minn. 162, the principle is thus

stated by the Supreme Court of Minnesota: "The rule is that a communication, made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral or social, if made to a person having a corresponding interest or duty, is privileged; that in such case the inference of malice, which the law draws from defamatory words, is rebutted, and the *onus* of proving actual malice is cast upon the person claiming to have been defamed." To the same point are *Quin* v. *Scott*, 22 Minn. 456; *Laughton* v. *Bishop of Lodor*, L. R., 4 P. C. 495; *Toogood* v. *Sprying*, 1 Cr., M. & R. 193; *Harrison* v. *Bush*, 5 E. & B. 344; Add. Torts, § 1091; Moak's Underh. Torts 146. If fairly warranted by any reasonable occasion or exigency, and honestly made, the communication is protected for the common convenience and welfare of society: *Toogood* v. *Sprying*, *supra*. It is sufficient to confer the privilege that the matter is of public interest to the community: *Kelly* v. *Tinling*, L. R., 1 Q. B. 699; *Purcell* v. *Lowler*, 1 C. P. Div. 731; *Palmer* v. *Concord*, 48 N. H. 211; Cooley Torts. 217. And where the subject-matter is of interest to tax-payers, the communication is privileged, if made in good faith: *Smith* v. *Higgins*, 16 Gray 251; *Brush* v. *Prosser*, 11 N. Y. 347. Where the communication is privileged, plaintiff must show that it was not true, and that defendant had no reasonable grounds to believe that it was true: *McIntyre* v. *Bean*, 13 U. C. Q. B. 540. When the communication is privileged, and made or used in good faith, the plaintiff must sue the original slanderer, not him who repeats it in good faith: *Derry* v. *Handley* 16 Law T. (N. S.) 263. "I conceive the law to be that, though that which is spoken or written may be injurious to the character of the party, yet if done *bona fide*, as with a view to the investigation of a fact in which the party is interested, it is not libellous:" Lord ELLENBOROUGH, in *Delaney* v. *Jones*, 3 Esp. 393. If there is probable cause, it is of no consequence that the libel was malicious: *Streetz* v. *Wood*, 15 Barb. 105; *Cook* v. *Hill*, 3 Sandf. 350; *Klink* v. *Colby*, 46 N. Y. 427; *Bradley* v. *Heath*, 12 Pick. 163. In an action for a libellous communication to the appointing power, held, that the principles applicable for suits for a malicious prosecution govern, and, probable cause is a full defence: *Howard* v. *Thompson*, 21 Wend. 319; *Thorn* v. *Blanchard*, 5 Johns. 508. In case of a privileged communication, probable cause is a bar to the suit: *Chapman* v.

Calder, 14 Penn. St. 365. Charges made by a tax-payer at a public meeting are privileged: *Spencer* v. *Amaton*, 1 Moo. & R. 470. One of the strongest cases of privilege is that of *Brett* v. *Watson*, 20 Wkly. Rept. 723, where the defendant was employed to find out the character of a house. He was informed that it was a house of prostitution, and it was false. He repeated what he had been told to others, his object being *bonâ fide* to ascertain the character of the house. It was held that his communications were privileged. It is needless to multiply authorities. The doctrine of the foregoing cases is fully recognised in our own cases of *Gray* v. *Pentland*, 2 S. & R. 23; 4 Id. 420, 430; *Flitcraft* v. *Jenks*, 3 Whart. 158; *Chapman* v. *Calder*, 14 Penn. St. 365; *Brockerman* v. *Keyser*, 5 Clark 152.

A number of authorities were cited by the plaintiff, which he contended were in conflict with the foregoing. Among others was *Barr* v. *Moore*, 87 Penn. St. 385. The most that can be made of that case is that it ruled that the publication in question was not privileged, and therefore was governed by the ordinary law of libel. No one doubts the accuracy of that ruling. The article was not only a libel upon its face: it was utterly false; was coined by the party who published it, without even a pretence that there was probable or reasonable ground to believe the charges were true. The pretence that it was proper for public information was a mere cloak to cover up malice, and to publish a falsehood for political effect. That case was decided upon sound principles, and does not touch the one in hand. The language of the court must be considered in connection with its facts.

Rowland v. *Decamp*, 96 Penn. St. 493, also cited by plaintiff, was an action of slander against a public officer. The charge was that he was a "damned thief," and that, "if any of the borough bonds [meaning the borough of Verona bonds] came into his hands [meaning the plaintiff's], he would steal them and run away with them." It was not shown that the charge was true, or that there was probable cause to make it. As before observed, mere lies are not privileged. A man may not charge a public officer with being a thief, knowing it to be false, and in the absence of reasonable, probable cause the *scienter* will be presumed. Malice follows of course. Public officials are not outlaws, to be hounded and maligned at the will of every person who may have incurred their enmity, and no well-considered case has so decided. There is no

room for the application of the doctrine of privilege to such instances.

Some stress was laid upon the fact that, even if the reading of the letter to the Committee of One Hundred was excusable on the ground of privilege, the privilege was taken away because of the presence of the reporters, and *Parsons* v. *Singey*, 4 F. & L. 247, was cited in support of this view. But the circumstance was overlooked that the reporters were also citizens and voters. They had the same interest in the fitness of Judge BRIGGS for judicial station as had the committee or any other citizens. If it was proper to read the letter at all, it was proper to do so in their presence and hearing

Hamilton v. *Eno*, 81 N. Y. 126, and several other cases cited to show that to falsely accuse a public officer of a crime is not privileged, are wide of the mark. Supposing the letter to impute crime to Judge BRIGGS, whether it be misbehavior or corruption in office, we must not lose sight of the fact that Mr. Garrett made no such charge. He made no charge whatever. All he said was that some one else had made a charge in writing, stating briefly what Judge BRIGGS had been charged with, giving the name of the writer and the letter itself to the committee. How widely this differs from originating a false charge is plain to the dullest comprehension. I call attention to the facts of the case again that we may not be led astray upon a false issue.

The case narrows itself down to this: Conceding that a public officer, or a candidate for a public office, may not be falsely and maliciously charged with crime, or with anything else injurious to his reputation, have the voters, whose suffrages he solicited, the right to canvass and discuss his qualifications, openly and freely, without subjecting themselves to fine or imprisonment, or a ruinous suit for damages? If the voters may not speak, write, or print anything but such facts as they can establish with judicial certainty, the right does not exist, unless in such form that a prudent man would hesitate to exercise it. Is not the fact that a candidate is charged with crime by reputable citizens a matter proper for public information? Suppose, in the case in hand, the charge against Judge BRIGGS had been one for which he might have been indicted, is it possible that when two or three voters are gathered together, or where two or three hundred are assembled to consider his fitness for his office, the fact that such a charge had been made may not be

stated by one voter to the other without the peril of being mulcted in damages in case the charge should subsequently appear to be unfounded? And this, for an office for which the incumbent or the candidate should be like Cæsar's wife? A man's reputation may be bad upon many points that it would be difficult to prove. So long as he remains in private life it matters little; but when he becomes a candidate for office, even his private vices may become a matter of public concern. There are some official positions as to which the people are properly jealous of the character of those who aspire to them. The judicial office is one of these, and it is not too much to say that there are many private vices which the people would not tolerate, if openly and notoriously indulged in by a judge. They would tear the ermine from his shoulders, and hurl him from the bench. If, then, a candidate be a person of evil repute, in the sense that it affects his fitness for the office which he seeks—if respectable citizens honestly so believe and so state—may not such statement be repeated by others in connection with the canvass, at proper times and upon proper occasions, without the penalty of a libel suit? If not, we have indeed fallen upon evil times, and our boasted freedom is but a delusion. The principle contended for here, if sustained by this court, would put a padlock upon the mouth of every voter, and intelligent free discussion of the fitness of public men for office would cease. It would be a burden too grievous to be borne, and the people would be swift to reverse our decision, either by an act of assembly, or, if necessary, a change in the organic law. However unfounded the statements in the letter are now acknowledged to be, it is clear to our view that Mr. Garrett had probable cause for handing it to the committee, and had the charge been of a criminal nature, there was probable cause for a prosecution.

Referring to the three tests of privileged communication to which I have already alluded, they will all be found in this case. The occasion was a proper one. The meeting was composed of a body of citizens and voters assembled for the very purpose of considering the merits of candidates for office. At such meeting it certainly was the right, if not the duty, of any person present to state any fact bearing upon the fitness of either of said candidates for the positions they respectively aspired to. The circumstance that one of the candidates had been charged by a reputable citizen with conduct which was not consistent with a proper performance of official

duty was a fact which every elector present had a right to know and to state. For aught that appears, it was done from a proper motive, and we have already said it was based upon probable cause. It was a mistake, but an honest one, and corrected as soon as discovered. It was a subject of just annoyance to Judge BRIGGS, and if the law does not furnish him the redress he seeks, it is because of a rule of public policy of far more importance than the inconvenience of a single citizen. That rule requires that free discussion, especially upon political topics and candidates, shall not be so hampered as to make its exercise dangerous. The rule furnishes no shelter for the malicious libeller of private character, but it will not impute malice to one who honestly acts upon information received from other reputable citizens. We are accustomed so to act in all the affairs of private life, and if it we restrain it in public matters we afford protection to all the rogues and thieves who may, by their own cunning, or the negligence of the people, get into public office. In the enforcement of all general rules there will always be cases of individual hardship. But this is the sacrifice which the individual must make for the public good, just as the soldier is shot down in battle to preserve for others the blessings of free government. Speaking for myself, I would rather endure undeserved reproach than by any act of mine to impair a rule of so much importance to the public welfare. The people, sometimes hasty, are in the end always just, and will not long permit any public man to remain under a cloud, unless it is one of his own raising. Judgment affirmed.

MERCUR, C. J.—With all due respect for the judgment of the majority of this court, I must dissent therefrom. I will state some of the reasons which move me to this conclusion. The only question before us is whether the court below erred in not submitting the case to the jury. Although there may have been circumstances proper to consider in mitigation of damages, yet if, in any aspect of the case, the facts should have gone to the jury, it was error to withhold them.

It is well-settled law that any malicious publication, written, printed or painted, which, by words or signs, tends to expose a person to contempt, ridicule, hatred, or degradation of character, is a libel; and the person libelled may recover damages, unless it be shown that the publication was true, or that it was justifiably made:

Pittock v. *O'Neill*, 63 Penn. St. 253; *Barr* v. *Moore*, 87 Id. 385; *Neeb* v. *Hope*, 17 Weekly Notes Cases 93. While malice is an essential element in an action of libel, yet that must be understood in its legal signification. It may exist in the absence of lawful excuse, and where there may be no ill-will or disposition to injure others. Legal malice alone is sufficient to support an action. If a publication have the other qualities of a libel, and it be wilful and not privileged, malice may be inferred: Id. An act, unlawful in itself and injurious to another, is considered to be done *malo animo*: *Pittock* v. *O'Neill*, *supra*. Where the words used are of dubious import, they are to be interpreted according to the sense in which they were actually used: *Hays* v. *Brierly*, 4 Watts 392. The words of a libellous publication are to be taken in their natural sense. Words are not to be received *in mitiori sensu*, but in the plain and popular sense in which the world in general understands them: *Lukehart* v. *Byerly*, 53 Penn. St. 418. It is elementary law that every one who prints or publishes a libel may be sued by the person defamed, and to such an action it is no defence that it was printed or published by the desire or procurement of another, whether that other be made a defendant to the action or not. All concerned in publishing the libel, or in procuring it to be published, are equally responsible with the author: Odgers, Sland. & Lib. 157: Townsh. Sland. & Lib. 167.

The letter, for the publication of which this suit was brought, contains a strong imputation against the integrity of the plaintiff, and that it was only by his official action and charge to the jury that a specified steal of $200,000 was made possible. He was then serving as judge, and was a candidate for re-election. Giving to the language of the letter the plain and reasonable sense in which people generally would understand it, there cannot be any doubt that it imputes to him great misconduct or degradation of official character. So understood, they were libellous *per se*, and presumptively actionable. To remove this presumption the burden of proof is thrown on the defendant. It is conceded that the charge against the plaintiff was unqualifiedly false. He gave no charge to the jury in the *Hart Creek Sewer Case*, and was not in any manner connected with the trial relating thereto. Admitting this to be so, it is claimed on the part of the defendant that the publication was privileged. It is certain that the publication in this case was not made under circumstances to be what the law declares to be *absolutely privileged*. It was not published in any legislative body

known to the law, nor was it in any judicial proceedings. At most, the occasion could not make the publication any more than a *qualified privilege*. When a defendant, charged with libel, invokes such a protection to shield him from liability for that for which he would otherwise be held responsible he must prove that the occasion and surrounding circumstances made his action justifiable. The natural right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation: 1 Bl. Comm. 134. The security of his reputation or good name from the arts of detraction and slander are rights to which every man is entitled by reason and natural justice. The right to protect reputation is inherent in man. A good reputation is too valuable to admit of its being falsely and wrongfully assailed, without the law giving some redress to the person injured: *Barr* v. *Moore*, 87 Penn. St. 385. A reasonable and fair communication of thoughts and opinions is an invaluable right of man, yet a check on such freedom is imposed by the constitution of this commonwealth. Thus article 1, sect. 7, thereof, *inter alia*, declares that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Thus this right or liberty is not one of unlimited license, but is restrained by a legal responsibility: *Barr* v. *Moore*, *supra*. That the merits and demerits affecting the qualifications and character of one who is a candidate for a judicial office, as well as of one who is a candidate for any other public office, may be freely discussed and commented on, cannot be successfully questioned. These comments, however, have their bounds and limits. The right to discuss and to comment does not imply a license to falsely charge a person holding a judicial position, who is a candidate for re-election, with a specific act reflecting on his judicial integrity, and calculated to bring him into contempt and ridicule. Whenever a person makes such a charge, and claims protection under the name of a qualified privilege, the question of his motive in making it should be submitted to the jury. In my opinion it is clear error for the court to decide, as matter of law, that there was neither actual nor legal malice to be implied from the false charge. The well-recognised rule of law is correctly stated in Odgers, Sland. & Lib. 199. He says: "If, indeed, there were any means at hand for ascertaining the truth, of which the defendant neglects to avail himself, and he chooses rather to remain in ignorance, when he might have obtained full information, there will be no pretence for any claim of privilege."

In the present case the defendant was asked by his informant to "see the charge" of the judge, and to "reflect on the facts" shown thereby; in other words, to look at the record, and inform himself whether the construction put on the charge by the writer of the letter was correct. That record was conveniently accessible to the defendant. Any such record was a public record, kept in the centre of this city. The means were readily at hand for him to ascertain the truth. He neglected to avail himself of those means, and omitted to make an inquiry. He chose to remain in ignorance. The slightest examination would have shown that the improper conduct attributed to the plaintiff was false. Then, in the language of the law, there can be "no pretence for any claim of privilege." If such an allegation had been made against a personal friend of the defendant, it is hardly possible to conceive that he would have spread it before the public without first having made some effort to verify its correctness. "The plaintiff, however, is not bound to prove malice by *extrinsic* evidence. He may rely on the words of the libel itself, and on the circumstances attending its publication, as affording evidence of malice:" Odgers, Sland. & Lib. 270. The falsity of the words implies malice: *Farley* v. *Ranck*, 3 W. & S. 554; *Gorman* v. *Sutton*, 32 Penn. St. 247. As inquiry became the duty of the defendant before publishing the libel, he must be visited with constructive notice of what he could so readily have obtained by reasonable effort.

It may be asked, are the people to be prevented from criticising and discussing the conduct, character and qualifications of a candidate for office? Undoubtedly they are not. They must, however, confine themselves within the limits of truth, or permit a jury to pass upon their good faith and motive when they make a false charge: Starkie Sland. 110.

In an action for libel, it is for the court to determine whether the alleged libel is a privileged communication; but the question of good faith, belief in the truth of the statement, and the existence of actual malice, are questions for the jury.

Without elaborating the case further, I earnestly dissent from the action of the learned judge in deciding all these questions as matter of law, and in not permitting the jury to pass upon them.

GORDON and STERRETT, JJ., also dissent from an affirmance of the judgment, and concur in this opinion.